

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAUL MONPLAISIR, et al.,

Plaintiffs,

No. C 19-01484 WHA

v.

INTEGRATED TECH GROUP, LLC, et al.,

Defendants.

**ORDER DENYING PRELIMINARY
SETTLEMENT APPROVAL**

INTRODUCTION

In this wage and hour collective and putative class action, the parties move for conditional class certification and preliminary approval of a proposed class and collective settlement. Because the proposal unduly rewards counsel, appears detached from the merits of plaintiffs' claims, and unfairly burdens a discrete subset of plaintiffs, preliminary approval is **DENIED.**

STATEMENT

Prior orders detail the facts of this case. Briefly, defendants Integrated Tech Group, LLC and ITG Communications LLC ("ITG") install cable and communication equipment across the nation. In March 2019, ITG's employees sued for violation of both federal and California law. The complaint alleged a slew of minimum-wage and overtime, meal and rest-break, expense-reimbursement, and wage-statement violations by ITG. An August 2019 order conditionally certified a nationwide collective under the Fair Labor Standards Act (Dkt. No. 76). An order

1 dated March 2, 2020, however, compelled many plaintiffs to arbitrate their claims and
2 appeared to cut the collective from nearly 380 members to 132 (Dkt. Nos. 167; 228 at 6).
3 Undaunted, plaintiffs moved to certify a Rule 23 class of California employees (Dkt. No. 128).

4 But a problem emerged. Despite full briefing and a hearing, the putative class size
5 remained unknown because the parties' dueling motions targeted different groups. ITG
6 targeted the nationwide FLSA collective for arbitration. Plaintiffs' class certification motion,
7 however, shifted to California employees, of unknown count, potentially sidestepping the
8 arbitration order.

9 Seeking clarification, a March 6 order held plaintiffs' motion in abeyance and directed
10 discovery to determine the putative California-class size, how many putative members had
11 been compelled to arbitrate, and how many remained free to proceed with the class (Dkt. No.
12 168). Before these questions could be answered, however, the parties reached a proposed
13 settlement.

14 Following settlement conferences with Magistrate Judge Donna M. Ryu on February 28
15 and April 16, the parties attended, with the undersigned's approval, a mediation session with
16 the experienced wage and hour mediator, Jeffrey A. Ross (not to be confused with San
17 Francisco Superior Court's Judge Jeffrey S. Ross). Talks appeared fruitful. On July 22, the
18 parties reached an agreement and a July 27 order paused discovery, pending a motion for
19 preliminary approval of the proposed settlement. Counsel have now moved for preliminary
20 approval of a settlement on behalf of the 378 member FLSA collective and the 284 member
21 putative California class. ITG consents and does not oppose class and collective certification
22 for the present purpose. This order follows briefing and a hearing (held telephonically due to
23 COVID-19).

24 ANALYSIS

25 Our court of appeals maintains a "strong judicial policy" in favor of settlement of
26 "complex class action litigation." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th
27 Cir. 1992). But a class settlement must offer fair, reasonable, and adequate relief. *Lane v.*
28 *Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012). Preliminary approval is appropriate if "the

1 proposed settlement appears to be the product of serious, informed, non-collusive negotiations,
 2 has no obvious deficiencies, does not improperly grant preferential treatment to class
 3 representatives or segments of the class, and falls within the range of possible approval.” *In re*
 4 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (Chief Judge Vaughn
 5 Walker).

6 The crux of our proposed settlement is a non-reversionary \$1,625,000 payment to the
 7 class and collective members. Of this, \$21,500 will be set aside for the settlement
 8 administrator, \$30,000 for the California Labor & Workforce Development Agency’s share of
 9 the PAGA penalties, and \$5,000 as a service award for named plaintiff Monplaisir. Among the
 10 378 collective members and 284 members of the California class (46 who have already opted
 11 into the collective), each of our 616 plaintiffs would receive an average of \$2,545 (FLSA
 12 collective members would average \$1,325 and California members would average \$3,975).
 13 For several reasons, however, this proposal fails to pass muster.

14 *First*, the proposal is a steal for class counsel. Class counsel have agreed not to seek
 15 more than \$1,500,000 in fees, and ITG will not oppose any fee request up to \$700,000 (or costs
 16 up to \$150,000). Counsel characterize its fee and costs award as provided for “separately and
 17 in addition to” the payment to the class and collective (Dkt. No. 228 at 27). This just misses
 18 the reality here. ITG has agreed, effectively, to a gross settlement payment of between
 19 \$2,475,000 and \$3,275,000 (Dkt. No. 228-2 at ¶ 2(o)–(p)). Counsel will take between
 20 anywhere from 28% to 45% of this gross payment — an extraordinary fee given the 25%
 21 benchmark in this circuit. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)
 22 (*overruled on other grounds by Wal-Mart v. Dukes*, 564 U.S. 338 (2011)). This, before we
 23 even ask whether \$1,625,000 marks an adequate portion of the class and collective’s total
 24 potential recovery here.

25 It does not. Class counsel estimate the total potential recovery here at \$10.9 million. The
 26 settlement payment to the class and collective comes to between a 23% and 30% percent
 27 recovery before attorney’s fees, and a 15% recovery after. Even taking the gross numbers,
 28 counsel expect our plaintiffs to leave 70% to 77% of the potential recovery on the table here,

1 yet themselves seek to make off with 28% to 45% of the total payment. In this circuit, counsel
2 *earns* an extraordinary fee by winning an extraordinary result for their clients. They have not
3 yet done so here and this order will not bless counsel's sweetheart deal.

4 *Second*, the slim recovery here seems to be based more on ITG's successful motion to
5 compel arbitration than on a rigorous evaluation of the merits of plaintiffs' claims. ITG says it
6 will waive enforcement of the arbitration agreements for the purposes of obtaining a single,
7 efficient settlement here. But ITG cannot both waive arbitration for settlement purposes and
8 then hold the arbitration agreements over the negotiations for the purposes of slashing
9 plaintiffs' recovery. Simply, ITG wants to have it both ways, and the class and collective
10 would pay the price.

11 Presumably, the parties could yet justify a future low-end proposed settlement *on the*
12 *merits*. At class certification, ITG did ably contest the merits of plaintiffs' claims. For
13 instance, one declarant explained in detail how ITG guaranteed each employee a lawful
14 minimum wage, offered quality-incentive bonuses *above and beyond* the hourly wage, and
15 accounted for that bonus in overtime and double-time pay. Undercutting plaintiffs' overtime
16 claims, the same declarant described ITG's cell-phone app which tracked employee time
17 (showing that employees *were* paid for drive-time), prompted employees to take, delay, or skip
18 their rest and meal breaks, and awarded premium pay for skipped or missed breaks (Dkt. No.
19 142). While class counsel accounted for some of these defenses in determining their estimate
20 of ITG's total liability here (Dkt. No. 228), they have not presented a rigorous analysis
21 demonstrating how and the extent to which ITG's defenses undercut each of plaintiffs' claims
22 such that, in counsel's good judgment, a 15% recovery for the class is fair.

23 *Third*, even assuming that it would be proper for the proposed settlement to represent a
24 buyout of so many plaintiffs' arbitration agreements, the proposed settlement does not fairly
25 address the fact that a subset of plaintiffs, free of any arbitration requirement, would be
26 subsidizing that buyout for the rest. Just as a proposed settlement may not unfairly distinguish
27 between plaintiffs, it may not unfairly lump different groups together. As inadequate as the
28 proposal is for the majority of plaintiffs, it is even more so for the subset.

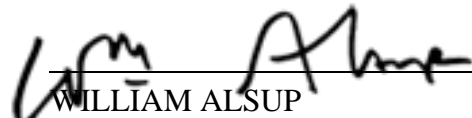
As a final note, the proposal draws out the settlement payment in installments. The parties justify this with vague assertions of ITG's financial situation. In the future, such a self-serving statement would require a sworn declaration with supporting material to be taken seriously.

CONCLUSION

The proposed settlement unduly rewards counsel at plaintiffs' expense, appears more a product of arbitration agreements than the merits, and unfairly burdens a discrete portion of the class and collective members. It remains conceivable that an amended proposal could be better justified. The undersigned's role, however, is not to amend the proposed settlement, but to either approve or deny it. *See Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989). Preliminary approval is **DENIED**. This order need not reach the question of conditional class certification. The parties shall please submit the requested supplemental numerosity discovery (Dkt. No. 214) by **NOVEMBER 27 AT 5:00 P.M.**

IT IS SO ORDERED.

Dated: November 7, 2020.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE